

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3
4

5 August Term, 2012

6
7 (Argued: February 1, 2013 Decided: February 27, 2013)

8
9 Docket No. 12-1006-cv
10

11 MARK R. MARASCHIELLO,

12
13 *Plaintiff-Appellant,*

14
15
16 -v.-

17 CITY OF BUFFALO POLICE DEPARTMENT, H. MCCARTHY GIPSON,

18
19 *Defendants-Appellees,*
20
21

22
23
24
25 Before:

26 WALKER, CABRANES, AND WESLEY, *Circuit Judges*
27
28

29
30 Plaintiff-Appellant Mark Maraschiello sued the City of
31 Buffalo Police Department and its police chief for racial
32 discrimination after the results of a civil service
33 examination were replaced by the results of an updated
34 version. The United States District Court for the Western
35 District of New York (Arcara, J.) granted defendants' motion
36 for summary judgment, finding that *Ricci v. DeStefano*, 557
37 U.S. 557 (2009), did not indicate that defendants' actions
38 were prohibited. We affirm.
39
40
41
42
43
44

1 RICHARD J. PERRY, JR. (Lindy Korn, *on the brief*),
2 Law Office of Lindy Korn, Buffalo, NY, *for*
3 *Appellant*.
4

5 JOSHUA FEINSTEIN, Hodgson Russ LLP, Buffalo, NY,
6 *for Appellee City of Buffalo Police*
7 *Department*.
8

9 TERRENCE M. CONNORS (James W. Grable, Jr., *on the*
10 *brief*), Connors & Vilardo, LLP, Buffalo, NY,
11 *for Appellee H. McCarthy Gipson*.
12

13
14
15 WESLEY, Circuit Judge:

16 Mark Maraschiello, a white male employed as a captain
17 in the City of Buffalo Police Department (the "Department"),
18 sued the Department and its police chief, H. McCarthy Gipson
19 (collectively "defendants"), claiming that their failure to
20 promote him was impermissibly motivated by race.

21 Maraschiello's scores on a 2006 civil service examination
22 rendered him eligible for promotion to the position of
23 inspector. After Buffalo adopted the results of a new exam
24 two years later, however, another officer was promoted to an
25 open inspector position. Maraschiello contends that this
26 amounted to racial discrimination in violation of Title VII
27 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1);
28 42 U.S.C. § 1983; and the Equal Protection Clause of the
29 Fourteenth Amendment. The United States District Court for

1 the Western District of New York (Arcara, J.) adopted
2 Magistrate Judge Leslie G. Foschio's report and
3 recommendation granting summary judgment in favor of
4 defendants. See *Maraschiello v. City of Buffalo Police*
5 *Dep't*, No. 10-CV-00187A(F), 2011 WL 7395095 (Sept. 13,
6 2011). We affirm.

7 **Facts**

8 Maraschiello, a white man, has at all relevant times
9 been employed by the Department as a captain. The
10 Department bases its promotional decisions for several
11 positions, including that of inspector, on the results of a
12 civil service exam. In accordance with New York law, the
13 City of Buffalo (the "City") may promote any one of the
14 three top scorers on a given exam. See N.Y. Civ. Serv. Law
15 § 61[1] ("Appointment or promotion from an eligible list to
16 a position in the competitive class shall be made by the
17 selection of one of the three persons certified by the
18 appropriate civil service commission as standing highest on
19 such eligible list who are willing to accept such
20 appointment or promotion . . ."). Maraschiello took the
21 exam required for the inspector position on September 16,
22 2006. He received the highest grade on the exam and ranked

1 first on a list of candidates that was certified on December
2 13, 2006. The parties do not dispute that the exam
3 qualified Maraschiello and the other two top scorers for
4 promotion to inspector at any time while the 2006 list
5 remained in effect. For most of this period, however, there
6 were no open inspector positions.

7 During this time, the City of Buffalo ("the City") was
8 going through the process of adopting a new police promotion
9 exam. Defendants submitted evidence that, in October 2006,
10 the City engaged personnel psychologist Nancy Abrams to
11 review the civil service exams. Abrams submitted an
12 affidavit stating that "[i]n part prompted" by "several
13 federal civil rights actions . . . challenging the City's
14 use of examinations prepared by the New York State
15 Department of Civil Service," the City "requested that [she]
16 review the Police promotional exams prepared by NYS Civil
17 Service . . . to evaluate whether they were valid
18 examinations that selected the candidates best suited for
19 the job and otherwise complied with applicable legal and
20 professional standards for employment examinations." Joint
21 App'x 88-89. Abrams concluded that the civil service agency
22 had not updated the job analysis in nearly thirty years and

1 that it was out of date, in part because its reliance on
2 multiple-choice questions was not "optimal for police work
3 and other fields requiring qualities - such as effective
4 oral communication and the ability to assume command of
5 situations - that are difficult to evaluate through such
6 traditional methods." *Id.* at 90-91. Abrams discussed these
7 conclusions with City officials, and "[a]fter receiving
8 [her] conclusions, the City published a request for
9 proposals [("RFP")] in April 2007 for an independent
10 consultant to develop new Civil Service examinations." *Id.*
11 at 91. Abrams "assisted the City in designing the RFP and
12 evaluating the responses received to accomplish these goals
13 and provide Buffalo with a better exam." *Id.* at 91-92.

14 The City issued the "Request for Proposals for
15 Development of Police Promotional Examinations" on April 27,
16 2007. The RFP began by reciting the "Regulations" governing
17 the bidding. *Id.* at 55-58. Of note is that the section
18 includes a provision entitled "Method of Tendering
19 Proposals." *Id.* at 55. That provision contains three
20 subsections. The first establishes that "all bidders must
21 tender their proposal on the form furnished with these
22 specifications"; the second states that no entity shall

1 submit more than one proposal; and the third states the
2 following:

3 All bidders must submit with their bid a statement
4 indicating that they will work toward a minority
5 workforce goal of 25%, and woman workforce goal of 5%.
6 In addition, a statement must be submitted indicating
7 that the bidder will work toward a business utilization
8 goal for minority business enterprise of 25% and woman
9 business enterprise of 5%.

10
11 *Id.* (emphasis omitted).

12 After the Regulations section, the RFP describes in
13 detail the sort of examinations it sought. It begins with
14 the following paragraph:

15 The City of Buffalo (the "City") has traditionally used
16 examinations prepared by the New York State Department
17 of Civil Service for examining candidates for
18 promotional titles within the Buffalo Police and Fire
19 Departments. In 1973 and 1974, civil lawsuits were
20 brought against the City alleging discrimination in
21 entry-level hiring in the Police and Fire Departments.
22 In 1978, the Court found there was discrimination, and
23 the Court has been overseeing various remedies since
24 that time. The City remains under Court supervision
25 with respect to entry-level hiring in both departments.
26 Further, in 1998 and in 2002, civil lawsuits were
27 brought against the City in which the examination for
28 promotion to fire lieutenant was alleged to have a
29 discriminatory impact against African-American
30 candidates. Those lawsuits are still pending as of the
31 date of this Request for Proposals. Although the City
32 denies that the examinations previously used were
33 discriminatory, it has decided to cease using the
34 examinations prepared by the New York State Department
35 of Civil Service for Police Officer and Firefighter
36 promotional titles and therefore is issuing this
37 Request for Proposals for the development of its own
38 examinations.

1
2 *Id.* at 60. The RFP contains further provisions detailing
3 the scope of the work – establishing, *inter alia*, that the
4 proposed tests must deal with job requirements and scoring
5 procedures. *Id.* at 60-70. It also states that “testing
6 instruments and procedures must conform to Title VII . . . ;
7 to this end, they must be free from non-job related factors
8 which might function as biases against any group on the
9 basis of race, color, religion, sex, age, national origin,
10 or any other classification protected by law.” *Id.* at 61.

11 In late 2007 and early 2008, the City selected
12 Industrial/Organization Solutions, Inc. from among various
13 bidders, and the two entities collaborated in developing a
14 promotional exam consisting of both a written test and an
15 oral assessment. After the development process was
16 complete, the City announced and administered the new exam
17 for the inspector position in two parts: the written
18 component in February 2008 and the oral component on March
19 31, 2008. Maraschiello elected not to take the 2008 test;
20 he does not allege that he was in any way prevented from
21 doing so.

22 On March 18, 2008, Gipson issued Special Order No.
23 2008-48, which stated: “Inspector Philip Ramunno, assigned

1 to the B District, has been granted a service pension in the
2 New York State Retirement System effective March 18, 2008."

3 *Id.* at 75.

4 On April 16, 2008, after the new test was scored, the
5 City adopted a new inspector list, and the 2006 eligibility
6 list automatically expired. Patrick Reichmuth, who is a
7 white male (as was every candidate on both the 2006 and 2008
8 lists), placed first on the 2008 list. Reichmuth had been
9 second on the 2006 list. Maraschiello did not appear on the
10 2008 list, which is not surprising given his failure to take
11 the test. On June 16, 2008, Reichmuth was appointed to fill
12 the vacancy created by Ramunno's retirement.

13 **District Court Proceedings**

14 After exhausting his administrative remedies,
15 Maraschiello filed a four-count complaint in district court
16 on March 5, 2010. He asserted claims of unlawful
17 discrimination under Title VII, § 1983, and the Equal
18 Protection Clause of the Fourteenth Amendment. He also
19 asserted a state-law claim for defamation based on an
20 alleged statement by Gipson, in the context of promotion
21 discussions, that Maraschiello "was a racist." Joint App'x
22 14.

1 Defendants filed a motion to dismiss the complaint
2 pursuant to Rule 12(b)(6), asserting that Maraschiello's
3 claim did not involve the sort of impermissibly race-based
4 action described in *Ricci v. DeStefano*, 557 U.S. 557 (2009).
5 The district court denied the motion, noting that
6 Maraschiello had alleged that after the adoption of the 2006
7 exam results, the city solicited bids for new exams with the
8 purpose of "increas[ing] minority representation on the
9 force." Joint App'x 30. The court then noted:

10 Defendants have failed to distinguish *Ricci* from the
11 facts of this case. Based upon plaintiff's
12 allegations, it would appear that *Ricci* applies to
13 plaintiff's discrimination claims. Plaintiff asserts
14 that the city discarded the 2006 exam results because
15 it wanted to increase minority representation on the
16 police force. Defendants do not dispute this point,
17 and, in fact, expressly acknowledge that the City had
18 endured "numerous legal challenges to the validity of
19 the civil service examinations" over the past few
20 decades and that the new exams were created "to avoid
21 further litigation with respect to those exams." In
22 light of *Ricci* and plaintiff's allegations that the
23 2006 exam results were discarded for the purpose of
24 avoiding further claims of racial discrimination,
25 defendant's motion to dismiss plaintiff's
26 discrimination claims is denied.

27
28 *Id.* at 31-32 (internal citation omitted).

29 In January 2011, after some discovery, Maraschiello
30 moved for partial summary judgment on the issue of
31 liability. Gipson cross-moved for summary judgment

1 dismissing the Title VII claims against him in his
2 individual capacity. Magistrate Judge Foschio recommended
3 that the district court deny Maraschiello's motion, grant
4 summary judgment *sua sponte* for all defendants on the
5 federal claims, and decline to exercise supplemental
6 jurisdiction over the defamation claim.

7 Judge Foschio first found that defendants could not be
8 held liable under Title VII based on *Ricci* because the case
9 was factually distinguishable. *Maraschiello*, 2011 WL
10 7395095, at *7-8. Judge Foschio found further that the
11 other evidentiary bases for Maraschiello's claim were
12 insufficient: Maraschiello's contentions that the RFP
13 statement regarding a 25% minority workforce referred to the
14 police workforce rather than a bidding contractor's
15 workforce were unavailing; Maraschiello never sat for the
16 2008 exam; and the person who was eventually promoted was,
17 like Maraschiello, a white man. *Id.* at *8-10.

18 Judge Foschio went on to determine that Maraschiello
19 could not maintain a claim under § 1983 because he had no
20 cognizable property right to the inspector position and that
21 Maraschiello's equal protection claim was moot in the
22 absence of a viable discrimination claim under the other two

1 statutes. *Id.* at *11-12. Finally, Judge Foschio
2 recommended that the district court decline to exercise
3 supplemental jurisdiction over the defamation claim because
4 the case was at a relatively early stage and a state-court
5 action would not be barred by the statute of limitations.
6 *Id.* at *14.

7 After Judge Foschio issued the recommendation and
8 report on September 13, 2011, Maraschiello filed objections.
9 On December 19, 2011, the district court held oral argument
10 on whether the recommendation and report should be adopted.
11 In order to provide additional notice to Maraschiello before
12 acting on the recommendation to grant summary judgment to
13 all defendants *sua sponte*, the district court permitted
14 supplemental briefing, which the parties filed in due
15 course. On January 24, 2012, the district court held a
16 second hearing to afford the parties a further opportunity
17 to present their respective positions. Finally, on February
18 16, 2012, the district court issued a decision adopting
19 Judge Foschio's proposed findings and dismissing the case.

20 Discussion

21 Maraschiello's brief on appeal contains no discussion
22 of the § 1983 or defamation claims and only three sentences

1 of unsupported argument regarding his equal protection
2 claim. See Appellant's Br. at 16. "Merely mentioning or
3 simply stating an issue in an appellate brief is
4 insufficient to preserve it for our review: an appellant
5 must advance an argument, and we generally will decline to
6 consider issues that are not sufficiently argued." *Niagara*
7 *Mohawk Power Corp. v. Hudson River-Black River Regulating*
8 *Dist.*, 673 F.3d 84, 107 (2d Cir. 2012) (internal quotation
9 marks and brackets omitted). Thus, it is only necessary for
10 us to consider Maraschiello's arguments regarding Title
11 VII.¹

12 "We review an order granting summary judgment *de novo*,
13 drawing all factual inferences in favor of the non-moving
14 party." *Ment Bros. Iron Works Co., Inc. v. Interstate Fire*
15 *& Cas. Co.*, 702 F.3d 118, 120-21 (2d Cir. 2012). "[W]e
16 affirm only where we are able to conclude, after construing
17 the evidence in the light most favorable to the non-moving
18 party and drawing all reasonable inferences in its favor,
19 that 'there is no genuine dispute as to any material fact

¹ Because we conclude that Maraschiello's Title VII claim fails, and "[t]he elements of [a Title VII claim] are generally the same as the elements of [an equal protection claim] and the two must stand or fall together," *Feingold v. New York*, 366 F.3d 138, 159 (2d Cir. 2004), his equal protection claim would fail in any event.

1 and the movant is entitled to judgment as a matter of law.'"
2 *Costello v. City of Burlington*, 632 F.3d 41, 45 (2d Cir.
3 2011) (quoting Fed. R. Civ. P. 56(a)).

4 I.

5 Title VII claims are generally "analyzed under the
6 familiar burden-shifting framework of *McDonnell Douglas*
7 *Corp. v. Green*, 411 U.S. 792 . . . (1973), and its progeny."
8 *Mathirampuzha v. Potter*, 548 F.3d 70, 78 (2d Cir. 2008). At
9 the first stage of *McDonnell Douglas*, a plaintiff "bears the
10 burden of establishing a *prima facie* case of
11 discrimination," which includes demonstrating that "he
12 suffered an adverse employment action . . . under
13 circumstances giving rise to an inference of discriminatory
14 intent." *Id.* "Once the *prima facie* case has been shown,
15 'the burden then must shift to the employer to articulate
16 some legitimate, nondiscriminatory reason' for the adverse
17 employment action." *United States v. Brennan*, 650 F.3d 65,
18 93 (2d Cir. 2011) (quoting *McDonnell Douglas*, 411 U.S. at
19 802).

20 A plaintiff may also attempt more directly to "convince
21 the trier of fact that an impermissible criterion in fact
22 entered into the employment decision" by "focus[ing] his

1 proof directly at the question of discrimination and
2 prov[ing] that an illegitimate factor had a 'motivating' or
3 'substantial' role in the employment decision." *Tyler v.*
4 *Bethlehem Steel Corp.*, 958 F.2d 1176, 1181 (2d Cir. 1992)
5 (citation omitted). If the employee does so, he is
6 "entitled to succeed subject only to the employer's
7 opportunity to prove its affirmative defense, that is, that
8 it would have reached the same decision as to [the
9 employee's employment] even in the absence of the
10 impermissible factor." *Id.* (internal quotation marks and
11 citations omitted).

12 Maraschiello's central contention is that *Ricci*
13 establishes that defendants' actions violated Title VII.
14 Repeated references in his brief to a "*Ricci* theory" or
15 "*Ricci* analysis" suggest that he is arguing that the case
16 established a new framework for Title VII litigation. It
17 did not. As we have explained, "*Ricci* does not impose a new
18 . . . summary-judgment burden-shifting framework, but
19 instead constitutes . . . a straightforward application of
20 the first two steps of *McDonnell Douglas*." *Brennan*, 650
21 F.3d at 93-94. Because *Ricci* involved a factual scenario
22

1 somewhat similar to Maraschiello's, however, it is worth
2 discussing that case in some detail.

3 In *Ricci*, a group of New Haven firefighters had taken
4 examinations necessary to qualify for promotions. 557 U.S.
5 at 562. "When the examination results showed that white
6 candidates had outperformed minority candidates," New Haven
7 agreed with other firefighters who "argued [that] the tests
8 should be discarded [prior to certification of the results]
9 because the results showed the tests to be discriminatory."
10 *Id.* New Haven "threw out the examinations" based on the
11 racial disparity reflected in the results. *Id.* The
12 plaintiff firefighters alleged that discarding the results
13 discriminated against them based on their race, in violation
14 of Title VII's prohibition of disparate treatment. New
15 Haven countered that "if they had certified the results,
16 they could have faced liability under Title VII for adopting
17 a practice that had a disparate impact on the minority
18 firefighters." *Id.* at 563.

19 The Supreme Court's analysis began with the premise
20 that, absent a valid defense, New Haven's actions would
21 violate the disparate-treatment prohibition because "[a]ll
22 the evidence demonstrate[d] that [New Haven] chose not to

1 certify the examination results because of the statistical
2 disparity based on race - *i.e.*, . . . because too many
3 whites and not enough minorities would be promoted were the
4 lists to be certified." *Id.* at 579 (internal citation and
5 quotation marks omitted). "Whatever [New Haven's] ultimate
6 aim - however well intentioned or benevolent it might have
7 seemed - [New Haven] made its employment decision because of
8 race [and] rejected the test results solely because the
9 higher scoring candidates were white." *Id.* at 579-80.

10 "[T]he original, foundational prohibition of Title VII bars
11 employers from taking adverse action 'because of . . .
12 race.'" *Id.* at 581 (quoting 42 U.S.C. § 2000e-2(a)(1)).
13 This prohibition was violated when "the firefighters saw
14 their efforts invalidated by [New Haven] in sole reliance
15 upon race-based statistics." *Id.* at 584.

16 "In other words, because [New Haven's] decision to
17 reject the test results was explicitly based on a
18 statistical racial disparity, it was beyond dispute that the
19 plaintiffs had made out a *prima facie* case, so the burden
20 shifted to the defendants to give a legitimate justification
21 for the adverse employment action." *Brennan*, 650 F.3d at
22 93. The Court thus turned to the question of "whether the

1 purpose to avoid disparate-impact liability excuses what
2 otherwise would be prohibited disparate-treatment
3 discrimination.” *Ricci*, 557 U.S. at 580. It rejected the
4 plaintiffs’ contention that an employer could never take
5 race-based adverse employment actions in order to avoid
6 disparate-impact liability, finding that so “broad and
7 inflexible [a] formulation” would impermissibly nullify
8 Congressional intent to stamp out racially disparate impact
9 along with disparate treatment. *Id.* On the other hand, the
10 Court also rejected New Haven’s argument that city officials
11 could “violate the disparate-treatment prohibition based on
12 a mere good-faith fear of disparate-impact liability”
13 because that “would encourage race-based action at the
14 slightest hint of disparate impact,” and “Title VII is
15 express in disclaiming any interpretation of its
16 requirements as calling for outright racial balancing.” *Id.*
17 at 581-82.

18 The Court concluded that it was appropriate to
19 “constrain[] employers’ discretion in making race-based
20 decisions . . . to cases in which there is a strong basis in
21 evidence of disparate-impact liability,” although this does
22 not require a “provable, actual violation.” *Id.* at 583.

1 Thus, an employer may not discard a test “to achieve a more
2 desirable racial distribution of promotion-eligible
3 candidates – absent a strong basis in evidence that the test
4 was deficient and that discarding the results is necessary
5 to avoid violating the disparate-impact provision.” *Id.* at
6 584. The Court held that the scoring disparity on the New
7 Haven test results could not provide that basis absent
8 evidence either that “the examinations were not job related
9 and consistent with business necessity” or that “there
10 existed an equally valid, less-discriminatory alternative
11 that served [New Haven’s] needs but that [New Haven] refused
12 to adopt.” *Id.* at 587. “Fear of litigation alone cannot
13 justify an employer’s reliance on race to the detriment of
14 individuals who passed the examinations and qualified for
15 promotions.” *Id.* at 592.

16 To subject the defendants to Title VII liability,
17 Maraschiello must either provide direct evidence of
18 discrimination or establish, as part of a *prima facie* case
19 under *McDonnell Douglas*, that he experienced an adverse
20 employment action “under circumstances giving rise to an
21 inference of discrimination.” *Brennan*, 650 F.3d at 93
22 (internal quotations omitted). If he does so, the burden

1 shifts to the City to justify its conduct, perhaps by
2 establishing a strong basis in evidence that it would
3 otherwise have been subject to a disparate-impact claim.
4 Because we find that Maraschiello has failed to provide
5 evidence from which a reasonable jury could conclude that he
6 suffered a discriminatory action under either framework, we
7 need not consider the justification issue.

8 Maraschiello's argument regarding the adverse
9 employment action he suffered was stated most clearly by his
10 counsel at oral argument before the district court after
11 Judge Foschio issued the Report and Recommendation:

12 When the vacancy came into existence, they chose not to
13 select him. They chose to use the new test which is
14 designed for a racial reason, and unless they can show
15 the necessary justifications then that's a facially
16 racial decision. . . .

17
18 The Supreme Court starts with that premise that if you
19 determine to change your test for fear of race -
20 disparate impact, racial disparate impact, if you make
21 that decision it's a race-conscious decision. And if
22 you then harm someone by it that's the discrimination.
23 . . . They picked the race test versus the test that
24 could have promoted him. If they had picked the 2006
25 test he would not have a *Ricci* claim at all. He
26 absolutely wouldn't.

27
28 Joint App'x 279-81. Maraschiello's claim thus appears to
29 center on the 30-day period between Inspector Ramunno's
30 retirement (on March 18, 2008) and the adoption of the 2008

1 eligibility list (on April 16, 2008). Construed most
2 generously, his argument is that, immediately upon Ramunno's
3 retirement, the City should have made its promotion decision
4 from the 2006 list that included Maraschiello but that the
5 City instead chose to delay the appointment decision for a
6 month in order to use the results of the new test, which was
7 adopted "for a racial reason." Thus, according to
8 Maraschiello, he was denied his shot at the promotion in the
9 same way and for the same reasons as the firefighters in
10 *Ricci*.

11 This argument cannot succeed. In *Ricci*, the defendants
12 threw out the results of a test based on the racial
13 disparity reflected in those particular results, denying the
14 firefighters who had taken it any chance of a promotion. In
15 this case, Maraschiello's results were certified, and he was
16 eligible for a promotion for over a year. More important,
17 however, is the manner in which Maraschiello's eligibility
18 expired. Unlike in *Ricci*, where the results of a specific
19 test were simply discarded based on the racial statistics
20 reflected in the results, here the City replaced the 2006
21 list with the 2008 list after spending more than a year

1 preparing to revise its assessment methods.² Its problem
2 was with the test itself, rather than with a particular set
3 of results. The City administered the first phase of the
4 2008 test in February, which was before the inspector
5 position Maraschiello desired became vacant. Maraschiello
6 chose not to take this test even before he knew that a
7 position would be open. In short, the City was already in
8 the process of preparing to replace the eligibility list - a
9 process in which Maraschiello chose not to participate.
10 This process, even though it eventually resulted in the
11 automatic invalidation of the 2006 list, was not a rejection
12 of that list for its own sake.

13 We do not read *Ricci* as confined to situations
14 involving the discarding of civil service test results based
15 on the disparity those results reflect. Rather, the case
16 establishes more generally that "before an employer can
17 engage in intentional discrimination for the asserted
18 purpose of avoiding or remedying an unintentional disparate
19 impact, the employer must have a strong basis in evidence to

²The City's replacement of the 2006 list complied with the requirements of New York law that certified test results remain in place for at least one year. N.Y. Civ. Serv. Law § 56[1] ("The duration of an eligible list shall be fixed at not less than one nor more than four years . . .").

1 believe it will be subject to disparate-impact liability if
2 it fails to take the race-conscious, discriminatory action."
3 *Ricci*, 557 U.S. at 585; see *Briscoe v. City of New Haven*,
4 654 F.3d 200, 206-07 (2d Cir. 2011). In other words, it
5 articulates the contours of a specific affirmative defense
6 to claims of unlawful disparate treatment based on race – it
7 does not expressly limit what may constitute disparate
8 treatment.

9 Nonetheless, Maraschiello's arguments are unavailing.
10 Even if it were determined that the City's choice to adopt a
11 new test was motivated in part by its desire to achieve more
12 racially balanced results – and there is evidence in the
13 record that at least suggests this – Maraschiello cannot
14 demonstrate that the generalized overhaul of departmental
15 promotional requirements amounted to the sort of race-based
16 adverse action discussed in *Ricci*. Indeed, *Ricci*
17 specifically permits an employer to "consider[], before
18 administering a test or practice, how to design that test or
19 practice in order to provide a fair opportunity for all
20 individuals, regardless of race." 557 U.S. at 585.

1 Although Abrams' statements regarding the reasons for
2 this replacement are unnecessary for our conclusion, they
3 lend it strong support. The statements indicate that the
4 City chose to update its testing requirements, and
5 subsequently its eligibility list, for reasons that had much
6 more to do with an advanced understanding of job
7 qualifications than with racial statistics. Maraschiello
8 has not attempted to dispute this evidence. Completing the
9 last phase of a long-planned adoption of a new standard is a
10 far cry from rejecting a set of results out of hand because
11 of their racial makeup. Updating an examination, a process
12 specifically permitted by statute, does not "create[] a
13 materially significant disadvantage with respect to the
14 terms of . . . employment." See *Williams v. R.H. Donnelley*
15 *Corp.*, 368 F.3d 123, 128 (2d Cir. 2004) (internal quotation
16 marks omitted).

17 Maraschiello's only other suggestion that the exam
18 update was discriminatory comes from the 25% language in the
19 RFP. This language does not support his claim. The City
20 submitted evidence, in the form of an affidavit by the
21 Director of Civil Services in the City's Human Resources
22 department, that the 25% language is mandated by the city

code whenever the City solicits bids for work. Joint App'x 79. The affidavit included the relevant section of the code, § 96-13F, which states:

The advertisement inviting bids for the doing of a work or improvement or for the furnishings of materials, supplies, or equipment shall among other things state that the bidder must submit prior to the awarding of a contract, a statement indicating that the bidder will work toward a minority workforce goal of 25%, and women workforce goal of 5%. In addition, a statement must be submitted prior to the awarding of a contract indicating that the bidder will work toward a business utilization goal for minority business enterprise of 25% and women business enterprise of 5%. These goals shall be utilized for all purchasing, professional services and construction contracts. In addition, all departments and City of Buffalo agencies must include in all bid specifications the minority workforce and business utilization goals as stated in this section.

Joint App'x 83. Although portions of this language considered in isolation might theoretically allow for multiple interpretations regarding which workforce a bidder must work to affect, the context makes crystal clear that it refers to the bidder's workforce rather than the City's. The language refers to all bids, including those to furnish materials or improve physical facilities - jobs which have no effect on city employment. The requirement that this language be included in all bid advertisements - not just those, like the promotion-examination advertisement, that

1 might end up having an effect on the City's workforce -
2 belies Maraschiello's contentions.

3 Maraschiello has provided neither direct evidence of
4 discrimination nor evidence from which a reasonable jury
5 could infer that discrimination occurred during the City's
6 process of updating and administering its promotion exam.
7 His Title VII claim thus cannot succeed to the extent that
8 it concerns this process.

9 Maraschiello's only remaining evidence is Gipson's
10 supposed comment that Maraschiello was a "racist." This
11 alleged remark similarly cannot support a claim that the
12 failure to promote him was on the basis of his race, despite
13 Maraschiello's conclusory and unsupported argument that it
14 "constitutes a clearly race-based bias." Appellant's Br. at
15 15. As defendants point out, the person eventually
16 appointed instead of Maraschiello was also a white man.
17 Even if this was not the case, a statement that someone is a
18 "racist," while potentially indicating unfair dislike, does
19 not indicate that the object of the statement is being
20 rejected *because of his race*. See *Holcomb v. Iona College*,
21 521 F.3d 130, 139 (2d Cir. 2008) (noting that Title VII will
22 support a claim by an "employee [who] suffers discrimination

1 because of the employee's *own* race" (emphasis in original)).
2 "Racism" is not a race, and discrimination on the basis of
3 alleged racism is not the same as discrimination on the
4 basis of race.

5 Maraschiello provides no other evidence of unlawful
6 discrimination, and his Title VII claim therefore fails in
7 its entirety.

8 **II.**

9 Finally, Maraschiello argues that the district court's
10 denial of defendants' motion to dismiss created binding law
11 of the case regarding the viability of his Title VII claim
12 and that the district court inappropriately granted summary
13 judgment *sua sponte*. Neither of these claims can succeed.

14 The doctrine of law of the case is "discretionary and
15 does not limit a court's power to reconsider its own
16 decisions prior to final judgment." *Virgin Atl. Airways,*
17 *Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.
18 1992). And in any event, the doctrine would not preclude a
19 district court from granting summary judgment based on
20 evidence after denying a motion to dismiss based only on the
21 plaintiff's allegations. See *id.* The district court's
22 decision on the motion to dismiss depended on Maraschiello's

1 allegation that “the city discarded the 2006 exam results
2 because it wanted to increase minority representation on the
3 police force.” Joint App’x 31. The evidence reflects that
4 the situation was a good deal more complicated. It was not
5 error for the court to revisit a conclusion based on factual
6 allegations taken as true at the motion to dismiss stage,
7 and determine, based on undisputed evidence at the summary
8 judgment stage, that no reasonable jury could find that the
9 type of action discussed in *Ricci* occurred. See *Brown v.*
10 *City of Syracuse*, 673 F.3d 141, 148 (2d Cir. 2012).

11 As explained in his brief, Maraschiello’s second
12 argument amounts to a contention that the district court
13 failed to view the evidence in his favor, rather than a
14 claim that he was denied procedural protections. See
15 Appellant’s Br. at 12-15. He does not dispute that after
16 Judge Foschio recommended *sua sponte* summary judgment, he
17 was afforded the opportunity to file objections, engage in
18 oral argument, file additional briefing, and engage in
19 additional argument. This constituted adequate procedural
20 protection. See Fed. R. Civ. P. 56(f)(3) (governing the
21 granting of summary judgment *sua sponte*); *Priestley v.*
22 *Headminder, Inc.*, 647 F.3d 497, 504 (2d Cir. 2011). The

1 District Court fully complied with the mandates of Rule
2 56(f) and did not err in granting summary judgment *sua*
3 *sponte*.

4 **Conclusion**

5 We have examined all of Maraschiello's arguments on
6 appeal and find them to be without merit. For the foregoing
7 reasons, the judgment of the district court granting summary
8 judgment for defendants is **AFFIRMED**.